Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 772

KENNETH W. PINKSTAFF

v.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation.

REPLY BRIEF FOR PETITIONER

INDEX.

AUTHORITIES

	PAGE
Cases:	
Affolder v. N. Y. C. & St. L. Ry. Co., 339 U.S. 96	4
Grand Trunk Ry. Co. v. Ives, 144 U.S. 408	9
Minnis v. Friend, 360 Ill. 328	9
Norfolk & Western Ry. Co. v. Earnest, 229 U.S. 114	6
Rio Grande W. Ry. Co. v. Leak, 163 U.S. 280	9
Statutes:	
45 U.S.C.A. 53	2, 5
Ch. 110, Section 68.1, Ill. Rev. Stats.	6
Ch. 110, Par. 74, Ill. Rev. Stats.	7
Ch. 110, Par. 101.36, Ill. Rev. Stats.	7
Appendix	9

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1960.

No. 772

KENNETH W. PINKSTAFF, *Petitioner,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a corporation, *Respondent.*

REPLY BRIEF FOR PETITIONER.

Respondent intimates that because Petitioner has recovered a judgment in the sum of $50,000, little heed need be paid him. Petitioner was entitled to a trial in accord with the mandates of Congress and the interpretation of those principles by this Court.

Indeed, if the carrier's violation of the Safety Appliance Act were to be considered as evidence of negligence on the part of the employee, such would gravely have affected the quantum of the verdict, and consequently have wrought a serious impairment of right.

The fact that the statute (45 U.S.C.A. 53), as well as the teachings of this Court, have been violated by the opinions below which can only generate further error furnish an adequate ground for the allowance of this writ.

Nor is this, as Respondent would indicate, an isolated situation. When we refer to this instruction as becoming "a pattern instruction" we mean that henceforth in Illinois in an action involving negligence under the F.E.L.A. and the violation of the Safety Appliance Act it will be permissible for the carrier to have the jury instructed:

1. That the employee was guilty of negligence in applying the given safety appliance notwithstanding that it was inefficient;
2. That certain specific conduct on the part of the employee constituted negligence.

Of course, no two law suits involve the same facts, but the principles of jury instructions are consistent.

Respondent recognizes the gravity of the error in the instruction where the inefficiency of the appliance is charged to the employee as negligence. It urges that there was a conflict in the facts concerning the efficiency of the ap-

pliance. We submit there was none. That there may be no doubt, let us refer both to the opinion of the Illinois court and the Record.

The Illinois court referred to the testimony of Conductor Edwards, who was standing on the ground between two tracks some 26 car lengths removed from the occurrence which took place on a track curving in a southeasterly direction from where he stood. (A. 141, 142, 143) It is upon him that the Respondent relies as creating a conflict as to whether the appliance was efficient. We shall demonstrate how the Illinois court, in holding there was some conflict, did not bespeak the record.

Illinois Supreme Court—

"There is some conflict in the record as to how far from the embankment the train was when plaintiff went down to set the angle cock, since the conductor stated that the lead car was then 'at least two car lengths from the embankment.' Under such circumstances, there would not have been sufficient time for plaintiff to climb down the 15-foot car, set the angle cock, and for the brakes to operate before the train would reach the embankment at the rate of speed it was traveling." (App. I, 3a)

The Record—

The Conductor:

"Pinkstaff started down off the end of the car—we had just hardly the full capacity of the track when he climb down. *I would not know exactly how many cars that would be but I would say he was at least two car lengths from the end of the track. That is the last time I saw him.*" (A. 144)

"I could not see the lead car from where I was standing. I couldn't see it * * * I couldn't tell where the end of the car was, because there was eight cars on another track between me and the end car that he was on." (A. 146)

The best that can be said for Respondent is Conductor Edwards' statement: "I would not know exactly how many cars that would be but I would say he was at least two car lengths from the end of the track." This statement is in nowise inconsistent with the car being four, five or six car lengths from the end of the track. Yet the Illinois court and Respondent, in an effort to create a factual dispute, omit the observation that "*I would not know exactly how many cars that would be but I would say he was at least two car lengths from the end of the track.*" Certainly the words "I would not know" and "at least" could not create an issue as to whether or not Petitioner had in fact applied the brake when the lead car was "close to three car lengths from the end of the track." (A. 106)

This effort to create a dispute as to the failure of the appliance is well appreciated when it is remembered that the conductor, who was giving an estimate, was at the other end of this curved track.

Nonetheless, Respondent, on the assumption that the Petitioner was on the top of the car "when only two car lengths • • • from the embankment" (Resp. Brief p. 3) attempts a mathematical argument. But the positive and undisputed evidence is that he applied the brake when the car was "close to three car lengths from the end of the track."

We submit that there was no conflict as to when the brakes were applied. Respondent does not, of course, contest that if the brakes were applied as petitioner stated, the train should have stopped before striking the embankment.

Nor did this Court in the *Affolder* case (*Affolder* v. *N. Y. C. & St. L. Ry. Co.*, 339 U.S. 96) in anywise intimate that

negligence of the employee can be explored for the purpose of determining whether there has been a violation of the Safety Appliance Act. And that is what the Illinois court holds. (App. I, 8a, 9a)

Respondent states that whether the appliance was operated in time was its theory of defense. But the question is whether such is a defense in law. And the instruction (R. 22) alleges that the Petitioner was careless and negligent in that he "failed to operate the air brake in time to stop the train before it collided with a dirt embankment." If Respondent's argument be accepted as it has been by the Illinois court, then negligence of the employee will enter into every Safety Appliance Act action under the guise of ascertaining whether there was a failure.

With reference to the allegation that contributory negligence in a Federal Employers' Liability Act action need not be "specially presented" is meant that it is not necessary for an employer to plead contributory negligence of the employee in a Federal Employers' Liability Act action in order to be entitled to an instruction on the effect of the employee's negligence. Contributory negligence, as it was pleaded and as the jury were instructed, was an affirmative defense, notwithstanding that it is not such under the statute. (45 U.S.C.A. 53)

Nor did we, as Respondent asserts, raise any question in this Court for the first time. We did argue that in a Federal Employers' Liability Act action a defendant is not entitled to have the court single out certain facts. Indeed, that such is so is evident from our Petition for leave to Appeal to the Illinois Supreme Court, which stood as our brief in that court.

After pointing out that the instruction setting forth the alleged contributory negligence had omitted the element of causation, the warp and woof of contributory negligence (*Norfolk & Western Ry. Co.* v. *Earnest*, 229 U.S. 114), we argued at length how contributory negligence is determined not by particular facts but by the overall conduct of the individual under the given circumstances. That there can be no doubt of this, we are attaching as an appendix hereto that part of our Petition in the Illinois Supreme Court.

Respondent seems sensitive to the footnote in the Petition and dwells at length on it. It does not and cannot deny the truth of the facts. They are demonstrated in the post-trial deposition of the witness Jack Burge, who came to Chicago during the trial with the records and was sent home by the claim agent after it had been ascertained that Petitioner could have held certain positions on the Martinsville turn-around job. (A. 181, 182) Nor does it deny the contents of an affidavit filed under oath with the trial court as to its representations that it would comply with the subpoena served upon it. (A. 28, 29, 30)

When the Appellate Court held that there was no record to support the charges, it neglected to note that an affidavit is the approved way of presenting facts in support of a motion for new trial under section 68.1 of the Illinois Civil Practice Act (Ch. 110, section 68.1, Ill. Rev. Stats.). When it held that it could not consider the affidavits unless certified by the trial judge as part of the proceedings, it likewise overlooked certain statutes of Illinois.

These statutes, incidentally, specifically overruled the three cases which the Appellate Court relied upon.(1)

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(1) Section 74, Ill. Civil Practice Act provides thus:

"(2) All distinctions between the common law record, the bill of exceptions and the certificate of evidence, for the purpose of determining what is properly before the reviewing court, are abolished. The trial court record shall include every writ, pleading, motion, order, affidavit and other document filed or entered in the cause and, in addition, all matters before the trial court which are certified as a part of the record by the judge thereof. All matters in the trial court record actually before the court on appeal may be considered by the court for all purposes, but if not properly authenticated the court may order further authentication." (Ch. 110, par. 74, Ill. Rev. Stats.)

Rule 36(4) of the Illinois Supreme Court specifically provides:

"(4) Insufficient Authentication of Record on Appeal. "A claim that any matter in the trial court record incorporated in the record on appeal is not properly authenticated may be raised only by motion filed by the appellant or appellee before or at the time of filing his brief. The motion shall be supported by affidavit showing not only that the matter complained of is not properly authenticated, but that it is in fact incorrect, and that injury will result to the objecting party because of its inclusion. Unless a motion is made in the manner required by this rule, the record shall be deemed to be correct." (Ch. 110, par. 101.36, Ill. Rev. Stats.)

Respondent filed no such motion in either the Illinois Appellate or Supreme Courts.

Indeed, it is strange that Respondent's present position is that it objected to the relevancy of the records. It could have made that objection at the trial when they were offered, and the matter would have been before the entire court. On the contrary, it undertook to send its employee, who had come from Indiana with the records, on his way when they were found unfavorable. Nor could any offer of proof be made without the presence of the records, knowledge of their contents, and the witness.

CONCLUSION.

It is respectfully urged that this is a case where the writ should be granted.

Respectfully submitted,

JAMES A. DOOLEY,
Attorney for Petitioner.

APPENDIX.

Excerpt from Petition for Leave to Appeal to the Supreme Court of Illinois.

That the instruction is an argument by the Court is demonstrated by its singling out of certain facts favorable to the defendant. Whenever a Court undertakes to single out certain facts selected by the defendant and tell the jury that such facts may be evidence of contributory negligence, he is invading the arena of the jury; worse yet—he is making an argument for the defendant.

Whether a person is negligent is determined by whether he omitted to exercise that degree of care which an ordinary man would exercise under the surrounding circumstances. Singling out specific facts has been condemned by the National Supreme Court and this Court. (See *Grand Trunk Ry. Co.* v. *Ives*, 144 U.S. 408, 416, 417; *Rio Grande W. Ry. Co.* v. *Leak*, 163 U.S. 280, 288; *Minnis* v. *Evans*, 360 Ill. 328, 337, 338.)

Not only was there no evidence that plaintiff failed to keep a lookout, but the instruction was itself contradictory. It contended the plaintiff was negligent in failing to use a tailhose and likewise in failing to operate the air brake in time to stop the train itself. It was in the conjunctive—not in the alternative. It was impossible for the plaintiff to fail in both respects. If, under defendant's theory he was supposed to use a tailhose, he would not be operating an angle cock.

This instruction, in order to be proper, had to have some meaning in law. If it be an affirmative defense, it is contrary to the Act. If it be construed as evidence of contributory negligence, it is grossly prejudicial, absent the element of causation. At best, it is an argument for the defendant and subunits the plaintiff to an onus which the law does not impose upon him. What effect it had upon the amount of the verdict, no one can know. We do know, however, that it is erroneous. How then can it be said a man as gravely injured as Pinkstaff has been accorded that type of trial which the Act itself guarantees him? Such was part and parcel of the remedy afforded by these acts.